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Free Press

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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: GN Docket No. 17-142, MB Docket No. 17-91

Dear Ms. Dortch:

The Commission should abandon the draft Declaratory Ruling preempting San Francisco's ordinance Article 52 that it proposes to vote on during its July open meeting.[1] Not only does the preemption purport to solve a series of nonexistent problems based on virtually no evidence of harm, it would actively discourage facilities-based competition in the city and inhibit future competitive innovations across the nation.

In seeking to preempt Article 52 to the extent that the ordinance requires building owners to make "in use" wiring available for all competitors, the Commission's draft ruling suggests that such sharing requirements would reduce investment, slow deployment in multiple tenant environments ("MTEs"), and result in technical issues that would undermine the quality of communications services.[2] But the Commission has refused to evaluate the actual San Francisco market in drawing these faulty conclusions. In reality, the supposed harms of sharing "in use" wiring are largely theoretical problems that Article 52 already adequately protects against.

First, the Commission accepts the claim that Article 52 has resulted in decreased investment without citing any substantial evidence of such a decline. Instead, the draft ruling relies exclusively on the theoretical and anecdotal hand-wringing of a handful of realtors and incumbent providers with a vested financial interest in reducing broadband competition in order to maintain the profitability of their exclusivity arrangements.[3] It's concerning (if all too typical) that this Commission has drawn its conclusion regarding investment without adequate data.

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[1] *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, GN Docket No. 17-142 & MB Docket No. 17-91, Notice of Proposed Rulemaking and Declaratory Ruling, FCCCIRC 1907-04 (rel. June 19, 2019) ("Declaratory Ruling").

[2] *See id.* ¶ 42.

[3] *See, e.g.*, Susan Crawford, "The New Payola: Deals Landlords Cut With Internet Providers," *Wired*, June 27, 2016, https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with-internet-providers/.

Moreover, investment is only valuable as an indicator of deployment, in which the record also fails to substantiate purported declines. In fact, even a cursory analysis of San Francisco's broadband market suggests that broadband deployment has increased dramatically since the city passed Article 52. In fact the Commission's own 477 data shows that in June 2016, just 48 percent of San Francisco county were served by three or more fixed terrestrial ISPs at 25/3 Mbps, and only 16 percent had even one option for 1000/100 Mbps speeds. By the end of 2017, 56 percent of the county population had three or more 25/3 broadband options and 37 percent had at least one gigabit option, with 10 percent having two such options. Since Article 52's adoption, Sonic (a mid-sized regional ISP) has expanded its reach to approximately 300 new MTEs in San Francisco.[4] MonkeyBrains (a smaller San Francisco-based ISP) has expanded its reach from zero percent penetration in buildings with 40+ units and in which owners had revenue-sharing arrangements with incumbents, to seventy-five percent penetration in such buildings after Article 52.[5] Tenants in many MTEs now have the opportunity to choose between at least four ISPs or even request service from a provider that does not yet serve the building – a major shift from the state of play that led the city to pass Article 52 in the first place, response to consumer complaints that they had no meaningful choice for broadband service within MTEs.[6] The only counter-examples the Commission cites in its draft ruling are once again, anecdotal and limited, hinging largely on a vague assertion of one major ISP reneging on its previous plan to upgrade an MTE's wiring.[7]

The technological issues that could arise from sharing "in use" wires, such as service disruptions or diminished communications service quality, are largely mythical. The Commission can only cite examples of such problems in the comments of realtors[8] – the exact same commenters arguing that they do not have sufficient knowledge or expertise of the wiring their buildings own in order to upgrade them without the partnership of an incumbent ISP. Tenant advocate organizations have reported no such complaints, and this is largely due to the fact that few to no ISPs have chosen to share "in use" wiring, with even those as small as MonkeyBrains choosing instead to build their own core and rely on existing, unused wiring to reach the units themselves. In the case not shown in the record of this docket, in which "in use" wiring sharing might take place and be detrimental to service quality, Article 52 allows for

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[4] Reply Comments of CalTel, *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No.17-142, at 3 (filed Aug. 22, 2017).

[5] Letter to Nancy Pelosi from Preston Rhea, Director of Field Operations for MonkeyBrains, June 24, 2019, https://www.eff.org/files/2019/06/24/letter_to_speaker_pelosi_re_article_52.pdf.

[6] Dominic Fracassa, "New ordinance gives SF apartment dwellers more Internet options," *San Francisco Chronicle*, Dec. 24, 2016, https://www.sfchronicle.com/business/article/New-ordinance-gives-SF-apartment-dwellers-more-10816442.php.

[7] Declaratory Ruling ¶ 60.

[8] *See id*. ¶ 59, n.188.

building owners to deny new competitors access.[9] The Commission deems this exemption insufficient, but once again relies on purely theoretical speculation rather than any evidence of actual consumer complaints.[10]

Moreover, if sharing of "in use" wiring did result in such unrectified harms, providers who could afford to build out their own wiring would have every incentive to do so. It is disingenuous to complain that this rule both discourages providers who would otherwise be capable of deploying their own wires from doing so, while also claiming that those providers are somehow incapable of building their own exclusive wiring (that would not be subject to Article 52 sharing) in response to adverse conditions.

Preempting Article 52 even in part cause serious harms to competition. The ordinance has spawned facilities-based competition from regional players like Sonic, smaller outfits like MonkeyBrains, and other innovative start-ups.

Sonic tends not to depend on existing building wiring at all, because Sonic already deploys end-to-end – seemingly unperturbed by the Commission's fanciful theorizing that the possibility of other providers some day sharing "in use" building wiring should prevent further deployment. Plainly, the Commission's assumptions here are incorrect. And even such larger ISPs, whose business models do not rely on using existing wiring, would still suffer from the Commission's ruling taking aim at Article 52. While the draft ruling only partially preempts Article 52 to the extent it requires sharing of "in use" wiring, the accompanying Notice of Proposed Rulemaking and the draft ruling itself leave open the possibility of further incremental preemption.[11]

MonkeyBrains is small enough that it needs every efficiency in order to afford to deploy alongside incumbents. It has been able to find these efficiencies by serving dense MTEs whose doors were previously closed, and has benefitted from the use of existing wiring to supplement its buildouts. As noted above, MonkeyBrains still deploys its own core wiring within MTEs, and only relies on existing building wiring for the last leg to individual units. Without the efficiencies of using available wiring, the costs of building out its network and offering critical facilities-based competition would rise prohibitively.

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[9] Article 52 §5206 states that "Nothing in this Article 52 shall be construed to require a property owner to allow a communications services provider to access its property to install the facilities and equipment that are necessary to offer services to occupants where ... [t]he communications services provider's proposed installation of facilities and equipment in or on the property would ... have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property."

[10] Declaratory Ruling ¶¶ 49-55.

[11] *See id.* ¶ 44.

The Commission counters the criticism that its draft ruling would raise the cost of deployment for competitive ISPs by insisting that its role is to protect "effective competition, not competitors."[12] Firstly, this defense is deeply hypocritical – the Commission has preempted local government authority over rights of way for the sole express purpose of reducing small cell deployment costs for wireless companies planning to deploy 5G,[13] even though those same companies openly admitted that such changes would have no impact on their investment or deployment decisions and consequently, no impact on the broader market.[14] Secondly, this argument is framed so as to denigrate as ineffective all smaller competitors who might benefit from the efficiencies of using existing wiring as competition not worth promoting. In an industry with such expensive barriers to entry as fixed broadband, where only a bare handful of major competitors dominate the national stage and refuse to compete with each other, dismissing smaller competitors as unworthy of a level playing field is tantamount to dismissing all hope for real competition.

Preempting Article 52 would have serious and immediate anti-competitive consequences for the San Francisco market – and it would also inhibit future competitive developments across the nation. For all that the Commission insists in its draft ruling that it encourages local experimentation in order to promote broadband competition and deployment, it proceeds to take San Francisco to task for doing exactly that. The Commission bases its conclusions that Article 52 runs counter to federal policy entirely on the unsupported assumptions of harms discussed above, wrongly and baselessly determining that the ordinance would harm federal goals of promoting competition and deployment. In reality, the Commission has only managed to support the conclusion that Article 52 takes a policy tack the Commission itself has not – the exact definition of local experimentation. The Commission's baffling preemption decision will likely chill other localities exploring policy interventions to improve broadband competition and adoption.

Importantly, while preempting required sharing of "in use" building wiring is largely symbolic at this stage, since virtually no ISPs are engaged in such sharing, this decision could serve as a roadblock to cities intending to experiment with fiber open access models in the future. Fiber has the capacity to allow multiple providers to offer service over the same wires without any interference or quality disruptions. Consequently, as more fiber is deployed, any supposed technological threats of sharing "in use" wiring will disappear and more cities may be

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[12] Declaratory Ruling ¶ 69.

[13] *See generally, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 & WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, FCC 18-33 (rel. Sep. 27, 2018).

[14] Jon Brodkin, "Verizon won't speed up 5G buildout despite FCC preempting local fees," *Arstechnica*, Oct. 31, 2018, https://arstechnica.com/information-technology/2018/10/fccs-2-billion-giveaway-to-carriers-wont-speed-up-verizons-5g-deployment/.

drawn to pursuing open access models. Open access has been a very successful model for promoting broadband competition in other countries,[15] as well as in various U.S. municipalities,[16] and is now even taking root as a private enterprise model.[17] The Commission may choose not to enforce or even encourage open access rules on a federal level, but it has no justification to conclude that such models are inherently counter to its goals, or to denigrate successful open access models as merely "artificial" competition as the draft ruling does so callously.[18] The draft ruling would discourage localities from exploring open access systems even as technological innovation makes them more attractive, eliminating the environment for permissionless innovation and experimentation that the Commission seeks to promote.

The Commission has previously dismissed support for overbuilding competition as wasteful, and now in this draft ruling dismisses shared-facilities competition as artificial, while undermining a rule that promotes both. Pursuing this baseless and harmful preemption in defiance of these concerns would raise a critical question: What kind of competition, exactly, does the Commission support?

Respectfully Submitted,

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[15] Isak Finer, "From Sweden, a Perspective on Why Open Access Networks Are the Right Choice for Communities," *BroadbandAndBreakfast.com*, Oct. 4, 2017, http://broadbandbreakfast.com/2017/10/from-sweden-a-perspective-on-why-open-access-networks-are-the-right-choice-for-communities/.

[16] Karl Bode, "Small Idaho City Shows The Benefits Of Open Access Broadband Networks," *Techdirt*, June 10, 2019, https://www.techdirt.com/articles/20190605/08113442340/small-idaho-city-shows-benefits-open-access-broadband-networks.shtml; Lisa Gonzalez, "UTOPIA Is Not An Unreachable Dream, It's A Network," *Community Networks*, Nov. 13, 2018, https://muninetworks.org/content/utopia-not-dream-its-network-community-broadband-bits-podcast-331.

[17] Stephen Hardy, "Fullerton, CA, to benefit from privately funded open access broadband network," *Lightwave*, Apr. 8, 2019, https://www.lightwaveonline.com/fttx/ftth-b/article/16667969/fullerton-ca-to-benefit-from-privately-funded-open-access-broadband-network.

[18] Declaratory Ruling ¶ 69.